

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link Up)	WC Docket No. 03-109
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
Numbering Resource Optimization)	CC Docket No. 99-200
)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996)	CC Docket No. 96-98
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
)	CC Docket No. 99-68
)	
Intercarrier Compensation for ISP-Bound Traffic)	WC Docket No. 04-36
)	
IP-Enabled Services		

COMMENTS OF THE ATX GROUP, INC

The ATX Group, Inc., (ATX) submits these comments in response to the Commission's *Further Notice of Proposed Rulemaking* relating to the above proceedings.¹ The comments are directed to the Commission's proposals to collect a \$1.00 or \$.85 monthly fee for every phone number to support the Universal Service Fund (USF). The USF is a funding stream the Commission uses to subsidize telecommunications and information services in rural and high-

¹ In the Matter of High Cost Universal Service Support et al., *Order on Remand and Report and Order, Further Notice of Proposed Rulemaking*, FCC 08-262 (November 5, 2008).

cost areas as well as for schools, libraries and low-income households.² ATX provides telematics offerings to automobile manufacturers and their customers through the cellular network.

The means by which the USF is funded must be fair. At stake is the core credibility of a program intended to unify the nation through modern technology. That credibility is crucial to the private investment that lowers prices and enhances services to all Americans. When the USF program is not fair and imposes widely disproportionate fees and regulatory burdens, as the Commission proposes with regard to automotive telematics, that confidence collapses. The emergency response and vehicle safety features automotive telematics delivers will be choked under the weight of these burdens. ATX urges the Commission to reexamine its proposals and realign its fees to parallel network use and to reflect the law's equitable standard.

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² Section 254(b)(3), h(1)(B) of the Communications Act of 1934, as amended (the "Communications Act").

The ATX Group, Inc.

ATX, a unit of Cross Country Automotive Services, is the second-largest provider of telematics technology for the automotive industry, serving markets in North America and Western Europe. ATX technology is designed to enhance the safety, security and driving experience for vehicle owners and provide marketing and operational benefits to automobile original equipment manufacturers (OEMs) and their dealers. The technology supports the two-way communication of voice and data between a subscriber's automobile and ATX response centers.

The OEMs that are ATX customers include Mercedes-Benz, BMW, Maybach, and Rolls-Royce Motor Cars in the US and BMW and Peugeot-Citroen in Europe. Following the trend initiated by General Motors to extend OnStar's safety features across mass-market vehicle platforms, ATX is preparing to launch telematics-based safety features on three, new, mass-market vehicle platforms over the course of the next three years. ATX's telematics features integrate wireless communications, location technology, computer functions and the availability of live operators to address emergency and other needs of drivers. ATX's technology is able to locate precisely the individual confronted with an emergency, to communicate with the vehicle and its occupants, to provide assistance to that individual and to notify public safety agencies where that individual is located so that help can be dispatched. ATX's telematics features include automatic crash notification ACN and Mayday in-vehicle button response.

ATX developed its ACN technology around the cellular network. From this core technology, location-based emergency capabilities (ACN, Mayday button response, Remote Door Unlock, Stolen Vehicle Recovery and Roadside Assistance), can be provided. The investment of OEMs, ATX and its competitors replicates the Commission's pursuit of bringing

location capability to wireless phones, yet with private investment and without government mandate. Telematics is the only wireless offering that can provide the location of every call to the public safety answering point (PSAP), even in circumstances where the PSAP is not capable of receiving Phase II information. That investment is now being deployed throughout OEMs' entire line of vehicles as a feature available to individual and commercial owners.

In using the cellular network, each telematics vehicle is assigned a phone number. ATX, or its OEM partner, purchases airtime from a carrier. That airtime is distributed among all telematics vehicles served by the system. Communications are confined to data or voice transmissions between the vehicle and call center. The cost, of which the airtime constitutes only an incremental part, is, in most circumstances, particularly in vehicle models where telematics is just now being deployed, recouped by a subscription purchased by the vehicle owner, not through the vehicle's sale price. Communications with the call center are of very short duration. The assignment of a phone number reflects neither network use nor the ability to communicate beyond the call center and vehicle.

The Further Notice of Proposed Rulemaking

The Commission presents three draft orders that would restructure the method to collect revenues to support the USF. It proposes to replace the current assessment method that bases the fee on a percentage of interstate and international services revenue. The draft proposals differ with regard to assessing either a \$1.00 or \$.85 per month fee against every phone and also present a different structure with regard to business numbers. The draft orders also propose to

mandate record keeping and reporting requirements relating to fee collection to a much broader category of users.³

The Commission determines that a monthly fee against each phone number simplifies the contribution process and provides predictability as to the amount of universal service contributions and pass-through charges. It states that the methodology is technologically and competitively neutral. The Commission reasons that since interstate end-user telecommunications revenues have become increasingly difficult to identify, particularly for residential services, due to increased bundling of local and long distance service and the growth of consumer interconnected VoIP offerings, telephone numbers provide an easily identifiable basis for contribution. It also states that assessing universal service contributions based on residential telephone numbers will promote number conservation. The Commission acknowledges that while the \$1.00 per number per month assessment may represent an increase in universal service charges for residential customers that make few or no long distance calls, the increase should be slight.

The Commission's underlying premise is that imposition of a flat charge is warranted because all contributors and their subscribers receive a benefit from being connected to the public telephone network, enabling them to make and receive interstate calls. It states that the ability to make or receive interstate calls over a public network is a significant benefit and it is reasonable to assess universal service contributions for residential customers based on access to the network. The Commission concludes that customers who do not make any interstate calls still receive the benefit of accessing the network to receive interstate calls.⁴

³ We will reference a monthly fee of \$1.00 as either fee will impose a disproportionate assessment on telematics. As all three draft proposals treat telematics the same, our references will be to the Chairman's draft.

⁴ *Further Notice of Proposed Rulemaking* at paragraphs 105 – 114 of the Chairman's draft.

The Commission proposes an exception from its number assessment structure for prepaid calling services. In prepaid calling services, a percentage fee (\$0.001210654) will be assessed against the minutes used. It adopts an industry proposal that calculates the monthly fee by dividing the residential per-number assessment (the \$1.00 fee) by the number of minutes used by the average postpaid wireless customer in a month (826 minutes). This per-minute percentage would then be multiplied by the number of monthly prepaid minutes generated by the provider. This amount would be the provider's monthly universal service contribution obligation. The per-minute assessment is capped at an amount equal to the current per month contribution per assessable number (\$1.00). Prepaid calling services will be assessed a fee based on network use.

Phone numbers in telematics vehicles will be treated as residential numbers, charged either \$1.00 or \$.85 per month for each phone number. Telematics providers will be required to submit monthly reports and payments.

The Commission rejects OEMs' and telematics providers' position that a fee unrelated to network use violates the equitable and non discriminatory standard of the law and that its disproportionate impact will harm immeasurably the emergency response and vehicle safety features associated with telematics equipped vehicles. The Commission concludes that providing an exception to a particular category of end users would complicate the administration of the numbers-based methodology. It also states that the result would unfairly favor certain groups by reducing or eliminating their contribution obligations, while increasing the contribution obligations on providers that are not exempted from contributing.

The Commission reiterates that all users of the network, even those who make few or no calls, receive a benefit by being able to receive calls and states that it is appropriate for these consumers to contribute to universal service. It states that telematics providers can recover the

assessment from their end users. It finds unpersuasive that consumers will discontinue use of the service based on an assessment of only \$1.00 per number.⁵

The Proposal Violates the Law's Standards

The Equitable and Non Discriminatory Standard

The Communications Act of 1934, as amended, section 254(b)(4), establishes the standard by which the Commission may assess a fee to support the universal service program. That standard requires that contributions be "equitable and non discriminatory." This is the underlying premise required for any contribution mechanism- there must be fairness in allocating contribution duties. A wide disparity among users means that each cannot be assessed the same fee. The proposal explicitly disregards this premise. It ignores that while automotive telematics is assigned a large number of phone numbers, the extent and frequency of use of the network is extremely confined.

The record makes clear the miniscule use of the telephone network by telematics equipped vehicles. ATX has presented a model, extrapolated from its own and customer records, reflecting that the average number of calls per year from each vehicle is less than 2 and the average annual use per subscriber amounts to less than 15 minutes. We presented a hypothetical 300,000 telematics equipped vehicle fleet using 700,000-1,000,000 minutes per month, at an average cost per minute of \$.10. The total monthly USF assessment under the current structure is less than \$10,000. This compares to the Commission's model of \$1.00 per month per telephone number where the assessment will be \$300,000 per month, substantially more than the

⁵ *Further Notice of Proposed Rulemaking* at paragraphs 140-144 of the Chairman's draft proposal. In its discussion of telematics, the proposal characterizes it as a service that is provided through a transceiver, which is usually built into a vehicle but can also be a handheld device. This latter assertion is incorrect. ATX is unaware of any OEM or telematics provider offering telematics through handheld devices.

cost of the service.⁶ Other providers and automotive manufacturers have presented similar models.⁷

In imposing a \$1.00 monthly fee on every telematics equipped vehicle and rejecting the position of OEMs and telematics providers, the proposal fails to address the provisions of the Communications Act intended to guide how the fee is established. The standard of section 254(b)(4) must be the starting point of any fee to support the universal service program-- the contribution is "equitable and non discriminatory." A contribution mechanism where the fee approaches or exceeds the cost charged by the carrier for its service clearly violates this standard.

In *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 431 (CA 5 1999), the Court of Appeals for the Fifth Circuit ruled that a universal service fee that exceeded a carrier's revenue violates the law's equitable and nondiscriminatory standard. The Court held that where a carrier was assessed a fee in excess of its interstate revenues, the underlying premise required of any contribution mechanism was violated- there must be a fairness in the allocation of contribution duties. It characterized the assessment as a "heavy inequity" and that the cost imposed was "prohibitive."

The Fifth Circuit addressed the circumstances where a carrier had minimal interstate traffic and significant international traffic. The core telematics circumstance is even more egregious. Here, with the ability only to communicate between call center and vehicle, and where most consumers make no calls, network use is nominal and confined. The fundamental of telematics is the ability to transmit a call or signal to the call center in those infrequent

⁶ *Ex Parte* Communication of ATX Group, Inc., (March 16, 2006) and *Ex Parte* Communication of ATX Group, Inc., (April 19, 2006) set forth in CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116 and 98-170.

⁷ *Ex Parte* Communication of Mercedes- Benz USA, LLC (April 12, 2006); *Ex Parte* Communication of OnStar Corporation (March 28, 2006) and *Ex Parte* Communication of Toyota Motor Sales, USA (October 24, 2008), set forth in CC Docket No. 96-45.

circumstances when assistance is needed. It does not have pervasive access to the network for purposes of making and receiving calls from anywhere.

And it is here that the Fifth Circuit decision, which the Commission implemented by amending its rule and policies, counters assessing core telematics vehicles a \$1.00 per phone number monthly fee. A fundamental principle is present- a wide disparity between users means that each cannot be assessed the same fee. The degree of access to and use of the network are critical elements in determining whether the assessment is "equitable and nondiscriminatory." The proposed phone number assessment structure does not comprehend that while automotive telematics is assigned a large number of phone numbers, the extent and frequency of use of the network is extremely confined. A contribution model must recognize and accommodate such disparity. See *In the Matters of the Federal-State Joint Board on Universal Service and Access Charge Reform*, 15 FCC Rcd 1679, FCC 99-290 at paragraphs 23-25 (1999).

The Fifth Circuit decision in *Texas Office of Public Utility Counsel v. FCC* is the law. The proposal's failure to even address the decision reflects how it departs from the standard demanded by the Communications Act. The Commission is incorrect in stating that all users of the network, even those who make few or no calls, must equally contribute to universal service. It is incorrect in describing telematics technology as capable of making and receiving calls from anywhere. Nor can reliance on the administrative convenience needs of the agency trump the law's equitable standard. A fee in excess or approaching the cost of the service is wrong. The fee as applied to telematics is a "heavy inequity;" the cost imposed is "prohibitive."

The Proposal Fails the Standard of Reasoned Rulemaking

The proposal's justification to assess a \$1.00 monthly fee against each telematics vehicle even though the record shows minuscule use of the telephone network and confined access is

contradicted by its treatment of other services. In contrast to telematics, the proposal finds that prepaid calling services average 826 minutes per month and exempt such services from the \$1.00 fee. Instead, the monthly fee is determined by multiplying a percentage factor by minutes used so that the fee for prepaid calling services fee are linked to actual use of the network. This disparate treatment cannot withstand scrutiny.

Section 706 of the Administrative Procedure Act precludes agency decisions and findings that are arbitrary and capricious. An agency is obligated to analyze and explain the reasons for its decision.⁸ The Commission must examine the relevant data and state a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.⁹ This analysis and reasoning is integral to apportioning USF obligations on an "equitable and nondiscriminatory basis."¹⁰

The proposal's procedural failures profile its substantive deficiencies in not recognizing and accommodating telematics low usage and limited access. It also departs from the Commission's own precedent. The Commission has recognized that telematics offerings differ considerably from those provided by cellular carriers with regard to network access and use.¹¹ It has also gone to extreme lengths to determine a service's actual use of the network prior to determining a fee.¹²

The treatment of prepaid services shows that administrative convenience and predictability are not paramount to the law. Nor can an assessment far in excess of use be

⁸ *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

⁹ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁰ *Vonnage Holding Corporation v. FCC*, No. 06-1276 (June 1, 2007) at 20.

¹¹ In the Matter of Revision of the Commission's rule to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Report and Order and Second Further Notice of Proposed Rulemaking*, CC Docket No. 94-102, IB Docket No. 09-67, FCC 03-290 at paragraphs 71-82 (2003).

¹² The Commission decision addressing the fee to be assessed against VOIP providers, *In re Universal Service Contribution Methodology, Report and Order and Notice of Proposed Rulemaking*, 21 F.C.C.R. 7518, FCC 06-94 (2006) at paragraphs 55-59, pursued extensive analysis of network use.

rationalized on the basis of the Commission's authority to administer the North American Numbering Plan. Section 251(e) of the Communications Act provides no authority to assess fees to conserve phone numbers, particularly where there is no record showing further need to address phone number utilization. The responsibility to structure an equitable and non discriminatory fee applies to all services.

Any analysis undertaken consistent with the Administrative Procedure Act and the equitable and non discriminatory standards of section 254 must lead to a path where telematics is treated similarly to prepaid services. A decision where services averaging 826 minutes per month yet are assessed a fee based on actual use while telematics offerings that average 2 minutes per month are assessed a much higher fee is not competitively or technologically neutral as the Commission asserts. Recognition of varying network use must apply to all services.

A \$1.00 Monthly Fee Will Choke Telematics Deployment

The proposal rejects the position of OEMs and telematics providers that the \$1.00 fee is exorbitant and will choke telematics deployments across all vehicle fleets. Because of its public safety features, the proposal believes that customers are price insensitive and that additional costs can be passed directly to the end customer. The proposal's tone characterizes the additional fee as trivial.¹³

A feature that is optional, that is sold on a subscription basis, that can be terminated, is not necessary for the vehicle's functioning and is subject to increasing competition, is not price insensitive. The proposal's characterization that telematics is price inelastic has no basis. As presented by the ATX model, a fleet of 300,000 vehicles faces an additional monthly fee of approximately \$300,000 from its current USF contribution of \$10,000. The additional \$3.4

¹³ *Further Notice of Proposed Rulemaking*, Chairman's draft at paragraph 146, footnote 360.

million per year in additional costs provides no additional features or efficiency to the vehicle owner, OEM or telematics provider. It must be added to the cost of operating the entire telematics system, from its technology investment in the vehicle to the call center response operations. That the cost associated with the fee will approach or exceed that related to the airtime presents a confounding contradiction and result in a market determining factor.

The proposal ignores the critical direction of the telematics market. The sector has been evolving to the broader and more price sensitive mass market vehicle. The path is to provide low-cost data centric features, with ACN its core feature, priced significantly lower than today's average subscription; hypothetical models are being examined for approximately \$75-\$125 per year. The average monthly bill for traditional cellular services is \$73.00 per month.¹⁴ The additional \$12.00 will be devastating to an offering that does not anticipate an interstate call for virtually all vehicles. The \$1.00 fee will have a profound effect and dictate a decision that should be left to the consumer.

Telematics enhances emergency response and highway safety. It is the only wireless offering providing the location of every call to the public safety answering point (PSAP). Each call to a PSAP seeking assistance has been screened for emergency response to be dispatched. Call center personnel are trained to discern the assistance needed and provide the PSAP the nature of the emergency and where help should be dispatched to. The Commission has recognized telematics value in shaping wireless location responsibilities¹⁵ as have associations

¹⁴ *Dial Up Ten Tips for Lowering Your Cell Phone Bill*, quoting J.D. Powers Report, Minneapolis Star Tribune (April 20, 2008). www.StarTribune.com (visited November 23, 2008).

¹⁵ In the Matter of Revision of the Commission's rule to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Report and Order and Second Further Notice of Proposed Rulemaking*, CC Docket No. 94-102, IB Docket No. 09-67 FCC 03-290 at paragraph 72 (2003).

dedicated to improving emergency response.¹⁶ That next generation telematics offerings will deploy data transmission directly to the PSAP, with critical accident and incident data factors relayed, demonstrates how investment providing more innovation and efficient technology at lower costs, will be choked by the disproportionate \$1.00 fee.

The Communications Act aspires to services that promote access to modern technology by all Americans, particularly for public safety purposes.¹⁷ The USF has as one of its principles access to advanced services.¹⁸ The proposed \$1.00 monthly fee on automotive telematics goes in the opposite direction. It should be reversed.

The Proposal to Expand Payment and Reporting Requirements Should be Rejected

The proposal seeks comment on expanding data collection and payment responsibilities to what is characterized as all providers who are required to contribute to the USF based on the Assessable Numbers proposal. Currently, reporting rules apply only to “a telecommunications carrier that receives numbering resources from the NANPA, a Pooling Administrator or another telecommunications carrier.” The proposal inquires whether the Commission should amend its rules to require all providers who assign numbers or otherwise make numbers available to end users to file reports and make payments.¹⁹

With the enormous additional fee, the proposal seemingly intends for the Commission to impose additional regulatory burdens on a sector which are currently customers of wireless carriers- OEMs and telematic providers. The proposal departs from any reasoned universe of entities directly regulated by the Commission who can expect such compliance responsibilities.

¹⁶ Letter of the Association of Public Safety Communications Officials, International (APCO) and National Emergency Number Association (NENA), November 25, 2008, set forth in WC Docket 06-122 and CC Docket 96-45.

¹⁷ Section 1 of the Communications Act

¹⁸ Section 254(b)(2) of the Communications Act.

¹⁹ *Further Notice of Proposed Rulemaking*, Chairman’s draft at paragraphs 146-156.

It will add yet another significant cost that is not readily recouped. The proposal does not indicate how it will enhance the Commission's enforcement and other interests.

The proposal departs from the historic delineation the Commission has preserved between telecommunications and information services, the latter not generally subject to the Commission's direct regulatory authority. This separation is grounded on important policies promoting investment and innovation. The blending of these services cannot serve for such an overreaching scheme that captures virtually any entity that uses a phone number. The result will add substantial cost and deter investment.

OEMs and telematics providers purchase airtime and services from wireless carriers. The wireless carriers provide access to the network and administrative services with respect to assigning phone numbers to each vehicle and terminating the number when a subscription expires. The carriers have the information the Commission seeks and are in the best position to pay the USF fee. The record should be clear that telematics providers or OEMs pay the carrier for these services. If the carrier is relieved of the responsibility to file reports and pay the fees, its reduced costs will not be passed on. It will only cause further distortion and disruption to automotive telematics. The proposal to expand reporting and payments requirements should be rejected.

Conclusion

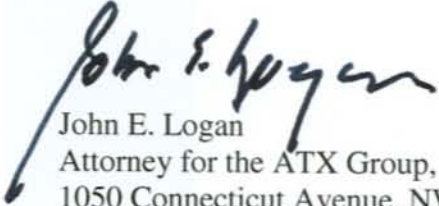
If the law's standard of equity and non discrimination has meaning, the Commission must reverse its proposal to assess telematics providers a \$1.00 monthly fee. The regressive character of the proposed fee dilutes the credibility of the Universal Service Fund to collect and spend monies fairly. It will choke the tangible improvements in vehicle safety and emergency response

that telematics delivers. The law imposes an obligation on the Commission to structure contributions to the Universal Service Fund in a way that reflects a service's use of the network.

Respectfully submitted,

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